TAN KANG HUA v. SAFETY INSURANCE CO.

[F.C. (Suffian, Gill and Ong Hock Sim F.JJ.) May 4, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 36 of 1971]

Insurance — Non-disclosure of material fact — Whether insurers induced to issue policy in question by reason of alleged concealment of facts.

This was an appeal against the judgment of the High Court whereby the respondents obtained a declaration that they were entitled to avoid a contract of insurance on the ground of non-disclosure. The trial judge found (a) that the assured had applied for insurance from the respondents and had signed the proposal form for such insurance; (b) that there was non-disclosure or misrepresentations of a material fact, that is, a claim with the previous insurers; (c) that the respondents were induced to issue the policy by reason of the non-disclosure and misrepresentation. On appeal to the Federal Court,

Held, allowing the appeal: (1) there was sufficient evidence in support of the finding that the proposal form had been duly signed by the first defendant;

(2) the learned trial judge was correct in holding that there had been non-disclosure and misrepresentation in the proposal form relating to material facts;

(3) in this case a more logical inference from the facts is that the insurers were aware of the facts which were alleged to have been concealed by the defendants at the time of the issue of the policy and therefore they were not entitled to the declaration which they asked for.

FEDERAL COURT.

David Tay Leong Siah for the appellant.

Edgar Joseph Jr. for the respondent.

Gill F.J.: This is an appeal by the second defendant in the action from a judgment of Mohamed Azmi J. whereby the plaintiffs, the Safety Insurance Company Ltd., obtained a declaration that they were entitled to avoid their contract of insurance effected by their policy of insurance No. PC/729881 in respect of the first defendant's Morris Minor car BF1513 for the period 1st March 1966 to 28th February, 1967. They also obtained a further declaration that apart from any provision contained in the policy they were entitled to avoid it under section 80(3) of the Road Traffic Ordinance, 1958 on the ground that it was obtained by the non-disclosure of material facts or by a representation of facts which were false in some material particular.

To begin with, the first defendant was named as the sole defendant to the action. He took no steps to defend it after the writ had been served on him by substituted service. The second defendant had himself added as a party interested in the action in that he as the father and next friend of Tan Ah Beng, an infant, had brought an earlier action against the first defendant for the recovery of damages in respect of personal injuries sustained by the said Tan Ah Beng as a result of an accident caused by the alleged negligent driving of the said car by the first defendant.

The proposal form in respect of the insurance policy in question was filled in by one Cheong Koh Long, a part-time agent of the plaintiff company, on the instructions of the first defendant's brother Liong Meng who took it away and handed it back to Cheong on the following day after it had been duly signed.

To question 8 in the proposal form as to whether the proposer had ever made a claim under any motor vehicle policy, the answer was "Nil". In answer to question 9(b)(1) it was stated that the proposer was entitled to a no-claim bonus from the New India Assurance Company Limited, the previous insurers of the car, under their policy No. 619/04/13805/65. To question 9(b)(2) as to the number of consecutive years the proposer had been insured free from claim, the answer was "Two". The policy with the previous insurers was for the period 1st March, 1965 to 28th February, 1966.

The proposal form in respect of the policy issued by the plaintiffs was dated 1st March, 1966. On 29th March, 1966 the plaintiffs sent a questionnaire to the New India Assurance Company enquiring whether the proposer had earned a no claim bonus under their policy, and they issued their comprehensive insurance policy in question on 13th April, 1967. The accident in which Tan Ah Beng was injured took place on or about 7th February, 1967 when the policy was still in force.

It is not clear as to when the plaintiffs were informed about this accident, but on 14th May, 1968 they sent a letter to the New India Assurance Company, Limited (Exhibit C7) in the following terms: —

"Re: Insured: Mr. Liong Woh
Vehicle: BF 1513 — Morris Minor
Your Policy No. 619/04/13805/65

We were given to understand that the above vehicle was covered by your goodselves under your above stated policy before proposing risks with us on the 1st March 1966.

We have written to you on 29th March 1966, enquiring the past claim experience of the owner but do not appear to have received your reply.

We shall be pleased if you will be kind enough to complete the enclosed NCB questionnaire and return same to us.

Your early reply will be greatly appreciated."

This questionnaire (Exhibits C8A and C8B), duly completed and showing a sum of $200 which was paid to Liong Woh (the first defendant) in settlement of a claim which he had made, was received back by the plaintiffs on 21st May, 1968.

On 30th July, 1968 the plaintiffs wrote another letter to the New India Assurance Company (Exhibit P2) in relation to the same policy. This letter reads: "We shall be obliged if you will favour us a reply to our letter dated 21st June, 1968.

For your easy reference, we enclose herewith a copy of our above mentioned letter."

On 5th August, 1968 the New India Assurance Company wrote a letter (P3) to the Safety Insurance Company in the following terms: —

"Thank you for your letter dated 30.7.1968 in respect of the above.

The car was found damaged while it was parked and we settled the claim for $200.00 being the repair charge of the vehicle."

On 27th August, 1968 the New India Assurance Company wrote yet another letter (Exhibit P4) as follows: —

"Re: Policy No. 619/04/13805/65
Vehicle No. BF 1513
Mr. Liong Woh

With reference to your letter dated 27.8.1968 in respect of the above we would inform you that the damage of the vehicle was reported to us on 4.1.1966."

It was the non-disclosure of the claim in respect of this damage which was the basis of the plaintiffs' claim in their action.

The issues before the trial court were — (1) whether the assured applied for insurance from the plaintiffs and, if so, whether he signed the proposal form for such insurance, (2) whether there was non-disclosure or misrepresentation of any material fact in the proposal form, and (3) whether the plaintiffs were induced to and did issue the policy in question by reason of the alleged concealment of facts. On the evidence produced before him, the learned judge found for the plaintiffs on all the issues and made the declarations sought for.

The first point made on behalf of the appellant before this court is that the learned judge erred in law and/or in fact in finding that the proposal form was signed by Liong Woh. This point is taken on the ground that there was no evidence before the learned judge to show that the first defendant had been seen to sign the proposal form. A further ground for this point is that the purported signatures of the first defendant on two other documents which were produced in court were different from the purported signature of the defendant on the proposal form.

In my opinion, this point is without substance. The learned judge accepted the evidence of Cheong Koh Long (PW3) that the signature on the proposal form reads "Liong Woh". It is true that no one saw Liong Woh sign the form, but there was the evidence of PW3 as to the circumstances under which the proposal form was filled in by him on the instructions of Liong Woh's brother and delivered back to him after it had been duly signed. The proposal form was in the name of the first defendant. It gave the same address as the address given in the policy issued by the previous insurers of the car. There was no evidence to suggest that there was another person of the same name and address to whom a policy of insurance had been issued in respect of the same vehicle. The insurance premium was duly paid and the plaintiffs issued the insurance policy in due course.

Counsel for the appellant produced before us a lengthy written submission in support of this point. All I need say is that all the arguments contained therein were put before the trial judge who, nevertheless, made a finding of fact that the proposal form had been duly signed by the first defendant. In my judgment there was sufficient evidence in support of that finding.

The next point taken on behalf of the appellant is that the learned judge erred in law and/or in fact in finding that the alleged non-disclosure or misrepresentation with regard to questions 8 and 9 in the proposal form was of a material fact. It is clear that there was non-disclosure in the proposal form of the claim which the first defendant had made with his previous insurers, so that his representation that the car had been insured free from claim for two consecutive years was false. As regards materiality of the non-disclosure and the consequential misrepresentation, section 80(5) of the Road Traffic Ordinance says that the expression "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and if so at what premium and on what conditions. The test of materiality is stated by *MacGillivray* on Insurance Law, 5th edition, Volume 1, paragraph 893, as follows: —

"In order to establish that a fact is material and ought to have been disclosed, it is not necessary for the insurers to prove that they would have acted differently if the fact had been disclosed; it is sufficient for them to establish that the fact, if known, might have induced reasonable insurers to decline the risk or increase the premium."

Now, Tai Ee King (PW1), the managing director of the plaintiff company, gave evidence to say that if his company had known about the claim made by the first defendant with his previous insurers they might or might not have issued the insurance policy, and that even if the company had agreed to do so it would not have issued a policy on the same terms as regards premium and conditions imposed on the drivers. K. C. Nair (PW2), manager of the New India Assurance Co., testified that if there had been a previous claim, as in the present case, he might issue only a third party policy or even reject the proposal form altogether. In the light of that evidence the learned judge expressed it as his considered opinion that the judgment of any prudent insurer would have been affected by the non-disclosure of the previous claim in deciding whether or not to accept the risk, and he went on to hold that on the facts of the case the non-disclosure and misrepresentation in the proposal form related to material facts. With those conclusions of the learned trial judge I respectfully agree. In the circumstances, I can find no substance in this second point either taken in support of this appeal.

To my mind, the main defence to the action, which is also the major ground of appeal before us, was that the plaintiff company were in fact not induced to issue the policy by reason of the non-disclosure and misrepresentation. This contention was based on the ground that at the time of the issue of the policy the plaintiffs knew that the assured had made a claim on his previous insurers, so that they also knew that he was not entitled to any no claim bonus.

As stated by the learned judge in his grounds of judgment, counsel for the second defendant urged the court to infer knowledge on the part of the plaintiffs of the fact not disclosed and misrepresentation of fact on five grounds. First, the date "29th March 1966" written in ink on the right hand side of the answers given to questions Nos. 8 and 9 suggested that that must have been the date on which the plaintiff company telephoned the New India Assurance Company for confirmation regarding no claim bonus. Secondly, the prompt replies received by the plaintiff company to their letters after the accident were the clearest indication that they must have received the reply to their questionnaire which they sent to the New India Assurance Company on 29th March, 1966. Thirdly, the New India Assurance Company and the plaintiff company had issued their policies to the assured within

about the same number of days from the date of execution of the proposal forms. If it was possible for the New India Assurance Company to finalise the question of no claim bonus within that period the logical inference to be drawn therefrom was that the plaintiff company knew about the non-eligibility of the assured to the no claim bonus when they issued their policy on 13th April, 1966. Fourthly, the plaintiff company in fact gave the first defendant no discount in respect of no claim bonus although there was an implied request for it in the proposal form. Lastly, the excess clause in the policy issued by the plaintiff company was consistent with their knowledge of the previous claim.

Having carefully considered those five grounds the learned judge made a finding that the plaintiff company could not possibly have known about the non-disclosure and the falsity of the representation contained in the proposal form at the time of issuing the policy. His reasons for that finding are set out in his grounds of judgment as follows: —

"I think it suffices for me to say that the best evidence to prove knowledge on the part of the plaintiff company must necessarily come from N.I.A. Co. Ltd. in the absence of any other direct evidence. In this case, the manager of N.I.A. Co. Ltd. (P.W.2) has testified that he had not received the questionnaire dated 29th March, 1966 (Exhibit D6) sent by ordinary post by the plaintiff company for confirmation of the no claim bonus. There is nothing in the file kept by P.W.2 to indicate the receipt of the questionnaire. To my mind, this corroborates P.W.1's evidence that he did not receive a reply. Even assuming that the original questionnaire was received by N.I.A. Co. Ltd., there is no evidence by P.W.2 that a reply had been sent either by letter or by phone. In this case, I have no reason to disbelieve the evidence of P.W.2. In my view, he is an independent witness who answered questions willingly both for the plaintiff company and the defendant. Unless P.W.1 and P.W.2 conspired to tell a pack of lies — which is never suggested by the defence — I have no hesitation in accepting his evidence that his company, being the previous insurer of the assured, had never received the questionnaire and had not sent a reply relating to the no claim bonus. I am further fortified in my belief by the letter dated May 14, 1968 (Exhibit C7) which confirms beyond all reasonable doubt that the plaintiff company never received back the questionnaire. It should be noted that Exhibit C7 was produced as a result of a question put to P.W.1 by the court."

It would seem clear that in making the finding referred to in the preceding paragraph, the learned judge relied on the evidence of PW1 and PW2. It is therefore necessary to consider what that evidence was. PW1 said:

"I have the letter dated 29.3.66. It is addressed to N.I.A. Co. Ltd. (Ex.-'D6'). They did not send us back the questionnaire as requested. I cannot recollect. . . . I have been in insurance business for a long time. Sometimes it is difficult to get a reply, unless we see them personally. . . . After the accident, I got quick replies from N.I.A. Co. Ltd. to both my letters, (Exhibits P3 and P4). The replies came on the same day. . . . As far as no claim bonus is concerned, I don't rely on the proposal (Exh. P1). As far as no claim bonus is concerned, I rely on evidence of previous insurer. That is why I sent Exhibit D6 to N.I.A. Co. Ltd. — dated 29.3.66. . . . I deny that I did not give the no claim bonus to first defendant because I knew of the claim. . . . I am sure there is no answer received to Exhibit D6. The questionnaire referred to in Exhibit D6 never came back to the best of my information and belief. . . . This letter dated 14.5.68 (Exhibit C7) confirms that I did not receive a reply to Exhibit D6."

PW2 said:

"On 18.1.71 I received a letter from Messrs. Safety Insurance Co. Ltd. According to my file, there was no earlier letter. There is nothing in the file to show we answered any questions. . . . Normally a letter like Exhibit D6 would not be kept in this file. . . . I cannot say whether I received the original. . . . I had made a search for Exhibit D6, but I could not find the original. . . . Exhibit P3 is signed by me. So is Exhibit P4."

In the light of the evidence of these two witnesses, can it be said that there was clear-cut evidence that no reply had been received to the questionnaire, Exhibit D6? I do not think so, especially when it is borne in mind that PW1 spoke of his being unable to recollect, even though he also said that he was sure, and PW2 said that he could not say whether he received the original. Whatever value one may place on the evidence of PW1 on this point, the evidence of PW2 certainly did not corroborate it. That PW2 was unable to trace the original of D6 in his file was not surprising because his evidence was that his file contained no letters from the plaintiffs other than their letter of 18th January, 1971. In the circumstances, with respect to the learned judge, there would appear to be no basis for his saying that he had no hesitiation in accepting the evidence of PW2 that his company being the previous insurers of the assured had never received the questionnaire and had not sent a reply relating to the no-claim bonus. What is most signicant is that PW2 was unable to produce from his file a copy of even the completed questionnaire (Exhibits C8 A and C8 B) which was sent by his company in answer to the plaintiffs' letter of 14th May, 1968 (Exhibit C7). That explains the absence of the original of D6 from his file, the logical inference being either that no copy of it was kept in his file or that it was completed and returned to the plaintiffs.

I agree that no inference can be drawn from the endorsement of the date "29th March 1966" in ink on the proposal form as regards communications from the previous insurer regarding no-claim bonus, but there are the following facts from which a logical inference to that effect can be drawn. The first defendant was charged the standard rate of premium. He was not given any no-claim bonus, and there was inserted in the policy an excess clause. PW1 explained that it was normal practice by his company to require production of evidence by the assured or his former insurer before any rebate in respect of a no-claim bonus was given. He further explained that it was also the practice of his company to charge the standard rate of premium in the absence of such evidence and to impose a non-excess clause in all cases. Here again, his evidence was not supported by PW2 who said that he would not issue a policy without clarifying the question as to whether the proposer was entitled to a no-claim bonus, except where the client wanted the policy urgently, and that where there was an entitlement to a no-claim bonus the insurance policy was issued without an excess clause.

In my judgment, in the absence of clear-cut evidence that the plaintiffs had received no reply to their questionnaire from the previous insurers, coupled with the facts that the first defendant was charged the standard premium, that he was given no rebate in respect of no-claim bonus and that an excess clause was imposed, a more logical inference is that the plain-

tiffs were aware of the facts which were alleged to have been concealed by the defendant at the time of the issue of the policy. If they were in fact aware of such facts, as would appear more probable from the evidence taken as a whole, they were not entitled to the declaration which they asked for. This is clear from the following statement of the law in *MacGillivray* on Insurance Law, 5th edition, paragraph 903: —

"*Facts known to insurers.* It is obvious that the insurers cannot complain of having been deceived when from some other source they had knowledge of the facts which they say were not communicated. As Cockburn C.J. put it in *Bates* v. *Hewitt* (1867) L.R.2 Q.B. 595, 605, the insurers cannot set up the defence of non-disclosure, not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him. which he had present to his mind at the time he accepted the insurance. Probably even if the non-disclosure by the assured was intentional and fraudulent, the insurers cannot set aside the policy if, by reason of their knowledge, the non-disclosure did not influence their judgment."

For the reasons I have stated, I would allow this appeal, setting aside the order of court below, with costs to the appellant both here and in the court below.

Suffian and **Ong Hock Sim F.JJ.** concurred.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Joseph & Son.*

HUSSANJAN v.
HAJI NIK YAHYA BIN NIK DAUD & ORS.

[O.C.J. (Ibrahim J.) June 6, 1972]

[Kota Bharu — Civil Suit No. 123 of 1965]

Land Laws — Contract — Agreement in relation to Malay Reservation land — Agreement void as being in breach of Kelantan Malay Reservations Enactment, 1930 — Land held in trust — Specific Relief (Malay States) Ordinance, 1950, s. 19 — Whether plaintiff a Malay and a native of Kelantan — Federal Constitution, arts. 89(6) and 160(2) — Evidence Ordinance, 1950 s. 115 — Estoppel by conduct.

In this case the plaintiff prayed for a declaration that the transfer of certain lands by the first defendant be declared void and that the lands be registered in her name. She alleged that the lands had been purchased by her late husband but registered in the first defendant's name. The plaintiff's husband had successfully bid at an auction for 13 lots of land, which he bought for the plaintiff but which were registered in the first defendant's name. Subsequently the first defendant and the plaintiff made a written agreement by which the first defendant agreed to transfer the lands to the plaintiff, after approval had been obtained from the Ruler in Council. The Ruler in Council gave the approval but the first defendant only transferred 10 out of the 13 lots to the plaintiff. The first defendant alleged that the three lots of land had been given to him by the plaintiff as a gift for building a school.

The issues raised in the case were as follows: —

(1) whether the plaintiff was a Malay and a native of Kelantan at the time when the lands were bought;

(2) were the three lots registered and held in the name of the first defendant in trust for the plaintiff?

(3) was there a gift of the said three lots by the plaintiff to the first defendant for purposes of erecting a school?

(4) is the plaintiff estopped by conduct from claiming the three lots?

(5) whether the agreement dated 12 June 1949 contravenes section 12 of the Malay Reservations Enactment 1930 and is therefore null and void.

Held: (1) on the evidence in this case the plaintiff was not a Malay and a native of Kelantan;

(2) the transaction in this case taken as a whole was an evasion of the provisions of the Malay Reservations Enactment and the agreement of 12 June 1949 was therefore null and void;

(3) the plaintiff's claim must therefore be dismissed;

(4) on the other issues in the case, there was evidence to show that the three lots were held in trust for the plaintiff but there had been a gift of the said three lots by the plaintiff to the first defendant for purposes of erecting a school and (even assuming the gift had not been validly made) the plaintiff was estopped by conduct from claiming the three lots.

Cases referred to:-

(1) *Hanisah* v. *Tuan Mat* [1970] 1 M.L.J. 213.

(2) *Foo Say Lee* v. *Ooi Heng Wai* [1969] 1 M.L.J. 47.

(3) *Lee Eng Teh & Ors.* v. *Teh Thiang Seang & Anor.* [1967] 1 M.L.J. 42.

CIVIL SUIT.

A. Wilson for the plaintiff.

C. O. Lim (*Ong See Seng* with him) for the defendants.

Ibrahim J.: In this action the plaintiff is praying for:—

(a) A declaration that the transfers of Lot 36 Mukim Wakaf Siku, Daerah Lundang, District of Kota Bharu of 10th day of October 1957 from Nik Yahya bin Nik Daud to Tengku Zainab binti Tengku Mohamed, of 31st day of March 1958 from Tengku Zainab binti Tengku Mohamed to Nik Yahya bin Nik Daud and of 3rd day of September 1961 from Nik Yahya bin Nik Daud to Tengku Abdullah bin Tengku Ahmad and Haji Nik Yahya bin Nik Daud as Trustees of Kelantan Parents Association are void and that they be set aside and the Land Register and title rectified accordingly;

(b) An order that the said Lot 36 Mukim Wakaf Siku, Daerah Lundang, District of Kota Bharu be registered in the name of Hussanjan bt. Baharam Khan (f) alias Mrs. Fateh Mohamed;

(c) Alternatively damages for breach of trust of Lot 36, Mukim Wakaf Siku, Daerah Lundang, District of Kota Bharu, by the first defendant and the 2nd and 3rd defendants.

(d) Damages for breach of trust of Lots 843 and 845, Mukim Wakaf Siku, Daerah Lundang, District of Kota Bharu by the first defendant;

(e) Such further and other consequential reliefs as the court may deem fit; and

(f) Costs of this suit.

The following facts are not in dispute. The plaintiff was the wife of a Pakistani Muslim named Fateh Mohamed who was a retired Detective Police Inspector and who had died on 3 October 1950 (page 105 of A). On 18 May 1948 Fateh Mohamed successfully bid at a public auction 13 lots of lands belonging to the estate of Tengku Zainal Abidin ibni Sultan Mohamed III. He paid the 25% advance payments on same day (pages 6-17 of A are copies of 12 of the 13 receipts) and the balance subsequently. He had bought those 13 lots for the plaintiff but the receipts had been put in the first defendant's name and the 13 lots had also been registered on 14 November 1948 in his name because they could not be registered in her name. Fateh